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Interstate Compacts Establishing State Entitlements to Water: An Essential Part of the Water Planning Process

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INTERSTATE COMPACTS ESTABLISHING STATE ENTITLEMENTS TO WATER: AN ESSENTIAL PART OF THE WATER PLANNING PROCESS

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Virtually every State in the Union is engaged in some type of water planning effort.[1] While plans vary, they generally involve an inventory of the water available within the state boundaries and a list of the in-state demands for use of that water. These uses can range from industrial to agricultural, from domestic to environmental. They generally continue by matching supply and demand, both current and future, and provide recommendations for accommodating those elements. The plans then address threats to water supply based on possible deterioration in water quality, and, likewise, discuss federal complexities relating to endangered species and federal reserved water rights, and where relevant, claims by Native American tribes.

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1. *See, e.g.*, 82 OKLA. STAT. §§ 1086.1, 1086.2 (2012) (directing the Oklahoma Water Resources Board to develop and update a comprehensive state water plan). Title 82, section 1086.1(A) provides:

> All of the people have a primary interest in the orderly and coordinated control, protection, management, conservation, development and utilization of the water resources of the state. The people residing within areas where waters originate benefit from the optimum development and utilization of water within the area of origin. The people in water deficient areas benefit by being able to use excess and surplus waters. The policy of the State of Oklahoma is to encourage the use of surplus and excess water to the extent that the use thereof is not required by people residing within the area where such water originates. In order to maximize the alternatives available for the use and benefit of the public and water-user entities and for the use and benefit of the public and for the general welfare and future economic growth of the state, it is therefore the purpose of this act to provide means for the expeditious and coordinated preparation of a comprehensive state water plan and decennial updates thereof for submission to the Legislature providing for the management, protection, conservation, structural and nonstructural development and utilization of water resources of this state, in accordance with [several identified] principles.

Id. § 1086.1(A). Such a state-wide plan differs from the regional approach to water planning taken by other states, including New Mexico. *See* N.M. STAT. ANN. §§ 72-14-43, 72-14-44 (1987). State boundaries, obviously, play a lesser role in regional water planning than in state-wide planning, where those boundaries determine the sources of water demand and supply.

This article explores the importance of the most significant part of the water planning calculus—determining the reach of the entities that can place a demand on a state's water resources. It asks the question: under what possible circumstances can a state engage in "state" water planning if the demand includes users out of state? The borders of the state define the extent of jurisdiction over all of the key actions that generate demand for water. That is, the legislature of one state cannot control the rate of growth in another state, the level of water conservation in another state, or the choices as to whether industries requiring large amounts of water should be encouraged to move factories to the other state. It is certainly understandable that a planning state cannot control rainfall or climate change. However, these uncontrolled factors can be factored into the baseline of supply. But, if, for water planning purposes, the state border is meaningless and the rate at which a sister state has exhausted its own water supply, only to jump across the state line and take that of another, becomes the determining factor, then water planning becomes a meaningless exercise. The author argues that the drafters of the Constitution in adopting the Commerce Clause[2] anticipated that the natural competition between and among states will require that the states arrive at negotiated accords over the use of their shared resources. However, this thesis must be measured against Supreme Court case law, which finds constitutionally suspect attempts by states to isolate and hoard their natural resources.[3] This article distinguishes between these lines of cases and concludes that it was and continues to be the law that states have a constitutional right to negotiate for

2. Article I, Section 8 of the United States Constitution enumerates the powers of Congress, one of which is the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The foremost problem of the federal union under the Articles of Confederation may have been its inability to tax. The failure of the Confederation may also be attributed, however, to the absence of national regulatory power over commerce, and to the resulting commercial "interstate brawls." SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 304 (1965). The records of the Constitutional Convention, the Federalist Papers, and the histories of the period all indicate that the framers of the Constitution sought to overcome interstate rivalries and parochial protection of local economic interests. It is this purpose that modern Supreme Court opinions continue to describe as the original intent of the Commerce Clause.

3. *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them."); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

and receive sufficient natural resources, including water, to provide for the support of their residents.

Part I of this article briefly describes the historical basis for the Commerce Clause. Part II then examines some of the early mechanical Commerce Clause tests. Part III reviews the evolution of the modern Dormant Commerce Clause doctrine and the application of strict scrutiny in the Commerce Clause context. Part IV summarizes the market participant exception to the Dormant Commerce Clause doctrine. Part V, in contrast, summarizes the law of equitable apportionment and interstate compacts, particularly in the natural resources context. Part VI argues that the Dormant Commerce Clause has no further application once Congress has approved an interstate compact. Part VII examines some of the policy arguments in favor of apportioning natural resources by means of interstate compacts. This article concludes that such interstate compacts are the best way of resolving interstate apportionment issues.

I. The Historical Basis for the Commerce Clause

The Articles of Confederation failed for multiple political, cultural and economic reasons. However, two principle problems are listed as the need for the revision or the replacement of these Articles with our current Constitution. One of these was the inability of the fledgling federal government to raise revenue; the other was the cropping up of barriers to interstate trade among the members of the Confederation.[4] To address this latter problem, the members of the convention ultimately agreed upon the clause in the Constitution empowering the federal government to regulate commerce among and between the states and with Indian tribes.[5] While the promulgation of the clause was an historic breakthrough, it did not go so far as to empower the federal government to have the exclusive power to

4. ALFRED H. KELLEY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT 108 (3d ed. 1963); MORISON, *supra* note 2, at 304.

5. "There were enough interstate brawls to cause great disquiet. The New York assembly in 1787 assessed heavy entrance and clearance fees on all vessels coming from or bound to New Jersey and Connecticut; New Jersey retaliated by taxing the lighthouse on Sandy Hook £30 a month." MORISON, *supra* note 2, at 304. *See generally* John B. Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556 (1936); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946).

regulate interstate commerce.[6] Some suggest that such a proposal would have broken up the convention.[7] Thus, it was left to the Supreme Court to determine when the subject matter of commerce was under the jurisdiction of the federal government and when it was the province of the states.[8]

It did not take long for Justice Marshall, in *Gibbons v. Ogden*,[9] to make it clear that the clause was to have some teeth and that state regulations inconsistent with the federal intent of regulation would be invalid.[10] *Cooley v. Board of Wardens*[11] served as an example of how that balance might be struck in another direction.[12]

II. The Early Mechanical Commerce Clause Tests

Because of the potential for inherent conflict between federal and state governments, the Supreme Court articulated numerous mechanical tests for drawing the line between state and federal regulations.[13] These included

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6. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 308 (Max Farrand ed., rev. ed. 1937); 3 *id.* at 478, 547-48. *See generally* SAUL K. PADOVER, TO SECURE THESE BLESSINGS 215-19 (1962).

7. *See* THE FEDERALIST NOS. 7, 11-12 (Alexander Hamilton); THE FEDERALIST NOS. 41-42 (James Madison); 1 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 502 (1854); MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 5-10 (1913); 1 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 266-75 (1901); *see also, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

8. The need to skirt that issue in order to reach consensus on the Constitution as a whole may be the best explanation for the silence in the Commerce Clause concerning the limitations on state power to regulate commerce.

9. 22 U.S. (9 Wheat.) 1 (1824).

10. Marshall's use of the Commerce Clause greatly furthered the idea that though we are a federation of states we are also a nation and gave momentum to the doctrine that state authority must be subject to such limitations as the Court finds it necessary to apply for the protection of the national community. *See* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 18-19 (1964).

11. 53 U.S. (12 How.) 299 (1851).

12. As Alfred North Whitehead remarked: "The [framers] had an uncommonly clear grasp of the general ideas that they wanted put in here, then left the working out of the details to later interpreters." DIALOGUES OF ALFRED NORTH WHITEHEAD 203 (Lucien Price ed., 1954); *see also* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949) ("[E]ven more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution."); F.D.G. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 30 (1937).

13. Owing perhaps to the natural law tradition underlying the early development of the American constitutional law, post-*Gibbons* Commerce Clause adjudication was marked by

mechanical tests that attempted to distinguish between when a product had started into the stream of commerce. For example, if the state regulation antedated the movement of the product, then in that case, it was subject to state regulation, but once it was in the stream of commerce it was subject to federal regulation. *Heisler v. Thomas Colliery Co.*[14] was an example of application of such a test. In *Heisler*, the act of extracting a resource was a local state regulated activity, whereas, placing it into commerce and interrupting its path through commerce was federal.[15]

When mechanical tests failed the Court finally abandoned them and was left with the task of balancing the relative burden of the state regulation on interstate commerce.[16] If the burden was too great and frustrated the purpose of the federal regulation then the state regulation would fail.[17] This case-by-case approach yielded mixed results without providing clarity of the line between permissible and impermissible regulation of commerce.[18]

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repeated but unsuccessful attempts to discover fundamental principles that could rationally and fairly be applied to all state regulations affecting interstate commerce. *See, e.g.*, Brown v. Maryland, 25 U.S. (12 Wheat.) 262 (1827); *see also* Mayor of N.Y.C. v. Miln, 36 U.S. (11 Pet.) 102 (1837) (state requirement that masters of out-of-state vessels supply passenger lists was not a regulation of commerce but an exercise of police power.)

14. 260 U.S. 245 (1922).

15. *Id.* at 260-61; *see also* Coe v. Errol, 116 U.S. 517, 528-29 (1886) ("There must be a point of time when they [goods] cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination.").

16. The distinction between "national" and "local" subjects began to give way in the late nineteenth century, just as the distinction between "regulation of commerce" and "police power" previously had proved inadequate to resolve interstate commerce disputes. The development of more sophisticated commercial relationships required the Court to look beyond the *subject* of a state regulation to examine the *effect* of the regulation on the flow of commerce. This focus on the regulation's impact on commerce led to the development of still another rubric for commerce clause analysis, which permitted state regulations to burden commerce "only indirectly, incidentally, and remotely." Smith v. Alabama, 124 U.S. 465, 482 (1888). State regulations deemed so substantial as to constitute "direct" burdens on interstate commerce were struck down. *See, e.g.*, Seaboard Air Line Ry. Co. v. Blackwell, 224 U.S. 310 (1917); *Smith*, 124 U.S. 465.

17. In *Wabash, Saint Louis & Pacific Railroad Co. v. Illinois*, 118 U.S. 557, 572 (1886), the Court struck down state regulation of railroad rates for interstate goods, even though there was no conflicting federal law. Fearing that the burden of such rates enacted by several states would be too disruptive of commerce (not unlike the state trade barriers of the Confederation), the Court decided that the area required national "uniformity of regulation." *Id.* at 574 (quoting Welton v. Missouri, 91 U. S. 275, 280 (1875)).

18. The modern Court will occasionally slip behind the comfortable obfuscation of one of these mechanical tests to reach a desired result. The debate between the majority and the

III. The Creation of the Dormant Commerce Clause Doctrine and Strict Scrutiny

If matters were not complicated enough when there was a clash between a federal regulatory statute regulating interstate commerce and a state statute operating in the same field, they became even more difficult when the Court concluded it had a duty to preempt state regulation of commerce even if Congress had not acted to do so. In effect, the Court reasoned that the mere adoption of the Commerce Clause, and authorization of congressional legislation pursuant to that clause, instructed the Court (by the "great silences" in that clause) to invalidate state laws that it concluded impeded interstate commerce.[19] The invalidation of state laws even though Congress has not acted is called the exercise of the "dormant commerce clause" doctrine. Some members of the current Court point out that in the same way as during the era of substantive due process invalidation of state laws, the high Court was substituting its judgment as to proper policy conduct by states for the judgment of the states.[20] Likewise, invalidation

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dissenting justice in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), is illustrative. In upholding a Maryland law that required oil producers and refiners to divest themselves of retail operations in the state, Justice Stevens, writing for the majority, reasoned:

> But this Court has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods. The evil that appellants perceive in this litigation is not that the several States will enact differing regulations, but rather that they will all conclude that divestiture provisions are warranted. The problem thus is not one of national uniformity. In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area.

Id. at 128-29 (citations omitted).

19. "[E]ven more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution." H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949).

20. A good example is *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007). In his concurring opinion in that case, Justice Scalia writes:

> separately to reaffirm [his] view that "the so-called 'negative' Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain. . . . The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce."

Id. at 348 (internal citations omitted). Due to this belief, or perhaps in spite of it, Justice Scalia has "been willing to enforce on *stare decisis* grounds a 'negative' self-executing Commerce Clause in two situations: '(1) against a state law that facially discriminates

under the dormant commerce clause has also been described as comparable to the application of the Equal Protection Clause to invalidate state economic choices as in *Lindsley v. Natural Carbonic Gas Co*.[21] Of course, substantive due process invalidation of state laws was abandoned and the test for invalidating economic measures under the Equal Protection Clause has been articulated to result in invalidation only in the most extreme of circumstances.

However, to avoid the argument that state regulation of commerce was mere evaluation of state choices regarding economic prerogatives and thus entitled to deference, the Court elevated the significance of the dormant commerce clause by requiring state laws that discriminate against commerce to be measured, not by traditional tests for evaluation of state economic legislation, but rather by a standard subjecting them to strict scrutiny somewhat comparable to the now innumerable equal protection tests for levels of scrutiny by category. The modern commerce clause balancing test is most clearly articulated in *Pike v. Bruce Church, Inc.*[22] There, the Court stated:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[23]

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against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by the Court.'" *Id.* (internal citations omitted). Likewise, in his concurring opinion in *United Haulers Ass'n*, Justice Thomas writes:

> Although I joined C & A Carbone, Inc. v. Clarkstown, I no longer believe it was correctly decided. The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice. As the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence.

Id. at 349 (internal citations omitted).

21. 220 U.S. 61, 64 (1911).

22. 397 U.S. 137 (1970).

23. *Id.* at 142 (citation omitted). *Pike* invalidated a state statute that required Arizona cantaloupes to be packed in the state. The Court suggested, however, that state regulations

In *Pike*, the Court attempted to adopt a balancing test that would measure the impact of commerce of the state statute against the local putative benefits but made it clear that if the effect was economic protectionism for the regulating state, then the State had the burden of showing that the method was carried out in the manner that was the least restrictive means of achieving the goal.

With respect to economically protectionist statutes regarding natural resources, the Court no longer engages in the fiction of weighing the relative benefits to the state against the impacts to commerce; rather, any intent to maintain a resource for the state and keep it out of the market is considered *per se* unreasonable.[24] The party attacking the statute merely has the burden of showing there was an impact on interstate commerce and protectionist intent. Once this showing has been made, the statute is presumed to be invalid.[25] An example of the presumptive invalidity test is found in *Sporhase v. Nebraska* ex rel. *Douglas*,[26] where the Court invalidated a statute precluding a Nebraska native from exporting a small portion of his groundwater to a part of his field in another state. The Court made no attempt to weigh the impact of commerce on irrigating one's own field in another state. Key to the *Sporhase* case's application of the per se invalidity test were specific findings of the Court. First, the Court found that the case did not involve an interstate compact where Congress had apportioned water from an interstate stream to Nebraska.[27] Second,

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affecting public health or safety might be subjected to a lesser standard of scrutiny. *Id.* at 143-44.

24. In an early resource isolation case, *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911), the Court was confronted with an Oklahoma statute that in effect prohibited the shipment of natural gas outside the state. The Court struck down the statute as purposeful discrimination against interstate commerce. The modern cases, of course, specifically recognize "the States' interests in conservation . . . as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens." Hughes v. Oklahoma, 441 U.S. 322, 337 (1979); *see also* City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978) (invalidating a New Jersey law that sought to protect that state's diminishing sanitary landfills by banning the importation of garbage).

25. In *Hughes*, an Oklahoma statute prohibiting the interstate sale of Oklahoma minnows was challenged on commerce clause grounds. 441 U.S. at 323. *Hughes* expressly overruled *Geer v. Connecticut*, 161 U.S. 519 (1896), which held that because the state "owned" the wild game within its borders the state's control over the game was outside the scope of the commerce clause. *Hughes*, 441 U.S. at 325-27. By overruling *Geer*, *Hughes* removed the only barrier to commerce clause scrutiny of the Oklahoma statute.

26. 458 U.S. 941 (1982).

27. For example, when rejecting Nebraska's argument that groundwater was not an article of commerce, the Court noted: "*If* Congress chooses to legislate in this area under its

Nebraska, as a state, was not the owner of the groundwater: its argument that it owned the water as a proprietor was a fiction, inconsistent with Nebraska's own state law.[28] Finally, Congress had not specifically addressed the groundwater in issue in any other legislation.[29]

The finding that the state was not the owner of the groundwater was central to the holding that the state was regulating a commodity in interstate commerce, namely water.[30] *Sporhase* is a prime example of the line of cases loosely referred to as the "resource isolation cases."[31] As with all constitutional doctrines based upon inflexible presumptions, the principle setting up the Court as marketplace policeman and striking down all protectionist restrictions soon began to fray around the edges.

IV. State Market Participation as an Exception to the Dormant Commerce Clause

Eventually, the Court was asked about the circumstance where the action taken by a state was not a regulation of the movement of a private commodity in commerce, by an allegedly protectionist state, but rather was

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commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar property laws." *Id.* at 953 (emphasis added). Further, when discussing the role of federal deference to state water laws and interstate water compacts *in general*, the Court distinguished them from questions relating to groundwater: "The interstate compacts to which appellee refers are agreements among States regarding rights to *surface water*." *Id.* at 959 (emphasis added).

28. *Id.* at 951-52.

29. *Id.* at 953-54.

30. *Id.*

31. *See* Michael B. Browde & Charles T. DuMars, *State Taxation of Natural Resource Extraction and the Commerce Clause: Federalism's Modern Frontier*, 60 OR. L. REV. 7, 31-33 (1981). The case law characterizes the rights of states to protect their natural resources from use in other states, as attempts to wrongfully "embargo" natural resources*, Sporhase v. Nebraska,* however, the Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) framed the issue more correctly to be whether the Commerce Clause allows one state to challenge the choice of another as to how and on what terms its resources should be placed into the interstate market. Rather than an embargo, a state may choose to isolate its resources for future generations or to allow the resources to enter the interstate market, but with a very high resource tax. "Rather, appellants assume that the Commerce Clause gives residents of one State a right of access at "reasonable" prices to resources located in another state that is richly endowed with such resources, without regard to whether and on what terms residents of the resource—rich State have access to the resources. *We are not convinced that the Commerce Clause, of its own force, gives the residents of one State the right to control in this fashion the terms of resource development and depletion in a sister State." Commonwealth Edison Co.*, 453 U.S. at 618 (emphasis added).

an exercise of economic choice by the State itself. Surely no one would argue that because money is a commodity in commerce, a State cannot prefer its own banks in deciding where to place its deposits obtained by taxing its citizens. Likewise, a state can surely choose to limit its retirement payments to state employees of its own state; it is not obligated to offer benefits to employees who worked an equal amount of time for a sister state government. States can prefer local contractors on state projects when spending taxpayers' money. If these principles are correct, could a state that built a cement plant using taxpayers' money choose to offer cement in times of shortage only to state residents? The answer of the Court was yes.[32] In building the plant and in investing taxpayers' money to do so, the state became a participant in the market with state capital. The dormant commerce clause did not contemplate extending its free market principles into the pocket of the taxpayer of one state and making her pay to subsidize construction in another state.[33] The same was true of a state's choice in paying a bounty on junk cars brought in for demolition as a measure of cleaning up the countryside in one state.[34] The state paying the bounty was not obligated to pay bounties for cars brought in from other states.[35]

The reach of the commerce clause into state government choices also arose in *National League of Cities v. Usury*,[36] where the Supreme Court raised, at least temporarily, the principle that when state legislation under the commerce power extends into the operation of state governmental

32. Reeves, Inc. v. Stake, 447 U.S. 429, 446 (1980).

33. *Id*. at 437.

34. Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

35. The best discussion of the market participant doctrine is contained in Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 396-98 (1989). It should be compared with William L. Kovacs & Anthony A. Anderson, *States as Market Participants in Solid Waste Disposal Services–Fair Competition or the Destruction of the Private Sector?*, 18 ENVTL. L. 779, 780-87 (1988). Another author has also explored this question thoroughly and thoughtfully. *See* David Pomper, *Recycling* Philadelphia v. New Jersey: *The Dormant Commerce Clause, Post Industrial Natural Responses, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1309-13 (1989). Government ownership has been recognized as market participation not subject to commerce clause limitations. *See* Swin Res. Sys., Inc. v. Lycoming Cnty., 678 F. Supp. 1116, 1119-20 (M.D. Pa. 1988), *aff'd*, 883 F.2d 245 (3rd Cir. 1989), *cert. denied*, 110 S. Ct. 1127 (1990). For a more recent Court pronouncement on the market participant doctrine, see *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 345 (2007).

36. 426 U.S. 833 (1976).

functions, then the Tenth Amendment becomes a bar.[37] The Court did not explain the scope of those functions, but at a minimum, those functions were free from interference with labor costs of municipalities by federal legislation. While the doctrinal Tenth Amendment principle in *Usury* was short lived,[38] no one doubted that, on whatever doctrinal basis, there are limits to federal intervention with state government.[39] If the state's ability to function as a state and protect its citizens is at issue, at least up to now, for example, there has been no attempt to argue that states are precluded from levying state taxes to support their own governments because this has an effect on federal power to tax.

A further difficulty raised by the dormant commerce clause became apparent in *Commonwealth Edison Co. v. Montana*.[40] There, Montana had levied a 30% severance tax on coal. The tax was even handed but the effect

37. *Id.* at 842.

38. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) ("Our examination of this 'function' standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.").

39. *See* California v. United States, 438 U.S. 645, 653 (1978) ("The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress."). In *Sporhase*, the dormant commerce clause limited *state* regulation of un-compacted groundwater. More recently, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 15, 173 (2001) and *Rapanos v. United States*, 547 U.S. 715, 750 (2006), have limited *federal* regulation of water under the affirmative commerce clause. The irony—and the potential regulatory vacuum—of these two holdings has been noted in Christine A. Kline, The *Dormant Commerce Clause and Water Export: Toward a New Analytical Paradigm*, 35 HARV. ENVTL. L. REV. 131 (2011). In other areas, the Court has limited the power of the federal government over states. *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (holding with respect to portions of the Brady Gun Control Act requiring state officers to administer background checks that the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program"); New York v. United States, 505 U.S. 144, 149 (1992) (holding that "while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so").

40. 453 U.S. 609 (1981).

was to shift the burden of the tax onto out-of-state consumers.[41] Those who opposed the tax argued that plainly there could not be a more blatant example of resource isolationism.[42] The argument ran that the dormant commerce clause makes all forms of economic protectionism per se invalid.[43] In adopting this rule, the Court precluded each state from situating itself as a monopolist holding a needed commodity away from sister states.[44] The 30% tax had as its sole basis the desire of the State of Montana to create a severance tax permanent fund that would be funded by revenues borne by other states.

The Supreme Court rejected the major premise that the dormant commerce clause had made the Court into a titular-antitrust regulatory board that would determine whether Montana held an inordinate market share of the nation's share of coal resources.[45] The Court considered itself unqualified to sit in this role and rule on these factual allegations, stating:

> The threshold questions whether a state enjoys a "monopoly" position and whether the tax burden is shifted out of state, rather than borne by in-state producers and consumers, would require complex factual inquiries about such issues as elasticity of demand for the product and alternate sources of supply. . . . It has been suggested that "the formidable evidentiary difficulties in appraising the geographical distribution of industry, with a view toward determining a state's monopolistic position might make the Court's inquiry futile.[46]
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> . . .
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> But even apart from the difficulty of the judicial undertaking, the nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process. Under our federal system,

41. *Id.* at 617-18.
42. *Id.*at 617-18.
43. *Id.* at 615.
44. *Id.* at 619.
45. *Id.* at 619 n.8.
46. *Id.* The Court stated further: "it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in a wide variety of individual cases." *Id.* at 628.

> the determination is to be made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests.[47]

In *Hughes v. Alexandria Scrap Corp.*,[48] the Court refused to balance Maryland's interest in its environment, reflected in its in-state preferential purchasing policy, against the interests of a free interstate market: "Nothing in the purposes animating the Commerce Clause forbids a State, *in the absence of congressional action*, from participating in the market and exercising the right to favor its own citizens over others."[49] The Court reached the same result in *Reeves, Inc. v. Stake*[50] when it refused to balance South Dakota's in-state preference for cement purchasers against the dormant commerce clause interest in a free market:

> [T]he competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, *Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.[51]

More important than that, the Court observed that if there were an inherent evil in the state of Montana seeking to tax coal within its boundaries, it was up to Congress to determine the correctness of the principle and if necessary set the rate.[52] There can be no doubt that Montana may constitutionally raise general revenue by imposing a severance tax on coal mined in the state. The entire value of the coal, before transportation, originating in the state, and mining of the coal depletes the resource base and wealth of the state, thereby diminishing a future source of taxes and economic activity. The proposition that state action as a market participant should only be invalidated by the Congress and not the Court was also articulated by Justice Blackman in commenting on the state program for setting bounties on junk cars in *Alexandria Scrap*.[53]

The wisdom of the Court in *Commonwealth Edison*, *Reeves* and *Alexandria Scrap* that one should look to Congress when evaluating state

47. *Id.*
48. 426 U.S. 794 (1976).
49. *Id.* at 810 (emphasis added).
50. 447 U.S. 429 (1980).
51. *Id.* at 439.
52. *Id.*
53. *See id.* at 434-36.

choices about its own resources does not stand in isolation. Rather, it is supported by over one hundred years of Supreme Court case law upholding apportionment of surface water among states so that each state receiving a share of the apportioned water could plan for its water future.

V. Equitable Apportionment and Interstate Compacts: Judicial and Congressional Authorization of State Economic Protectionism

As population grew within competing states, it was only a matter of time before states sharing a common river found themselves in conflict with the upstream state asserting absolute ownership of water originating within its borders and the downstream state arguing that the resource must be shared.[54] Because, as the Court observed, war between the states was not an option, the Supreme Court asserted original jurisdiction to resolve these interstate disputes.[55] The result of the dispute was a decree from the Court apportioning an amount to each state for its use in perpetuity. The criteria for apportionment is not fixed, but includes, as described in *Nebraska v. Wyoming*,[56] the needs of the two states, present and future, the conservation practices within each state, and the degree to which states have built up a dependence on the water resource through prior use.[57] However, whatever the criteria, the decree made each state secure in its entitlement to the quantity of water apportioned to it. Subsequent changes in demand could not alter that apportionment.

Because of the myriad difficulties in resolution of these original jurisdiction cases, consuming time and requiring factual trials, the Court encourages the states to attempt to negotiate interstate compacts that could

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54. *See, e.g.*, Kansas v. Colorado, 206 U.S. 46 (1907). There, the Court construed the issue to be whether Colorado "has it an absolute right to determine for itself the extent to which it will diminish [the flow of the interstate river], even to the entire appropriation of the water" *Id.* at 85. The Court answered in the negative:

> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.

Id. at 97.

55. *Id.* at 98 ("Surely here is a dispute of a justiciable nature which must and ought to be tried and determined. If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.").

56. 325 U.S. 589 (1945).

57. *Id.* at 618; *see also* Colorado v. New Mexico, 459 U.S. 176, 183 (1982); Wyoming v. Colorado, 259 U.S. 419, 467-70 (1922).

be ratified by Congress.[58] Once ratified, such compacts become: a) federal law; and b) binding contracts between the states.[59] Each state thus binds itself to a fixed apportionment of the water from the stream, not only by federal law, but also by contract.

These interstate water compacts, then, are the manifestation of the exercise of Congress of its power under the Commerce Clause and under the Compact Clause to regulate commerce. These compacts are not vague indirect regulations of commerce set by an agency such as water quality standards for streams or standards for interstate trucks nor are they indirect deferrals to states to regulate specific businesses. Instead, these compacts are specific directives from Congress that each compacting state shall receive a certain quantity of water and no more.

Compacts are federal law, and "congressional consent transforms an interstate compact within [the Compact Clause of the federal constitution] into a law of the United States" such that the construction of such an agreement "presents a federal question."[60] As the Court has noted,

> The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority.[61]

The "full and free exercise of federal authority" is particularly relevant to interstate compacts apportioning water among the states. Since at least 1891, the Supreme Court has recognized that Congress has plenary

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58. For example, in *Washington v. Oregon*, 214 U.S. 205, 218 (1909), a case involving an interstate boundary dispute, the Court concluded the opinion by noting congressional approval of other boundary compacts and stated:

> We submit to the States of Washington and Oregon whether it will not be wise for them to pursue the same course, and, with the consent of Congress, through the aid of commissioners, adjust, as far as possible, the present appropriate boundaries between the two States and their respective jurisdiction.

Id.; *see also* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 26-27 (1951); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 105 (1938); New York v. New Jersey, 256 U.S. 296, 313 (1921).

59. Oklahoma v. New Mexico, 501 U.S. 221, 245 (1991) (citing Texas v. New Mexico, 482 U.S. 124, 128 (1987); Texas v. New Mexico, 462 U.S. 554, 564 (1983)).

60. Cuyler v. Adams, 449 U.S. 433, 438 (1981); *see also* NYSA-ILA Vacation & Holiday Fund v. Waterfront Comm'n, 732 F.2d 292, 298 (2d Cir. 1984).

61. *Cuyler*, 449 U.S. at 439-40.

authority to enact legislation that authorizes the states to burden interstate commerce in a way that would otherwise violate the dormant commerce clause.[62] The cases following this basic rule are legion.[63]

The import of these cases to interstate water disputes is obvious: where Congress has affirmatively apportioned water to a compacting state, the dormant commerce clause is simply inapplicable.[64] In virtually all cases, the express purposes of the compact are to: a) resolve all future disputes as to ownership of the apportioned water; b) apportion a quantity of water to the respective states; and c) make it clear that one state cannot take water apportioned to the other without permission. In other words, they are unapologetically economically protectionist. To this end, when one state breaches the contract and attempts to take the waters of another in violation of the compact, the state is liable in damages and sovereign immunity is waived.[65]

In this regard, the case of *Intake Water Co. v. Yellowstone River Compact Commission*[66] is particularly instructive. There, the plaintiffs argued that the dormant commerce clause holding in *Sporhase* invalidated a Yellowstone River Compact provision that required unanimous approval by the signatory states for any out-of-basin transfer.[67] The district court observed that while a consent requirement on the out-of-state transfer of

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62. *See In re* Rahrer, 140 U.S. 545, 561 (1891).

63. *See, e.g.*, Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 472 U.S. 159, 174 (1985); W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 652-53 (1981) (citing Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 44 (1980)); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154-55 (1981); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946); S. Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 769 (1945); Whitfield v. Ohio, 297 U.S. 431, 438 (1936); James Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 330 (1917); Sw. Air Ambulance, Inc. v. City of Las Cruces, 268 F.3d 1162, 1177 (10th Cir. 2001).

64. People *ex rel.* Simpson v. Highland Irrigation Co., 917 P.2d 1242, 1249 n.8 (Colo. 1996) ("The congressional approval feature of a[n interstate water] compact is particularly important, in that Congress can assent to state laws which might otherwise be invalid as an unreasonable burden on interstate commerce."); *cf.* N.Y. State Dairy Foods, Inc. v. Ne. Dairy Compact Comm'n, 198 F.3d 1, 9 (1st Cir. 1999) (holding that congressional approval of an interstate compact creating a commission whose authority included regulating milk prices precluded a dormant Commerce Clause challenge to that regulation: "The relevant initial question, then, is not whether the Compact violates the Commerce Clause. Instead, the starting point of the inquiry is whether Congress consented to the actions of the Commission.").

65. *See infra* note 75.

66. 590 F. Supp. 293 (D. Mont. 1983), *aff'd* 769 F.2d 568 (9th Cir. 1985).

67. *Id.* at 296; *see also* N.D. CENT. CODE § 61-23-01 art. X.

water might ordinarily have run afoul of *Sporhase*, that case could not apply where Congress had approved the interstate compact containing that requirement.[68] That is, the claim that a court could overturn a federal compact apportioning water under the dormant commerce clause was an oxymoron: "Here, Congress's approval of the Yellowstone River Compact in 1951 may be considered the express statement of intent to immunize the Compact from attack that the Court found lacking in *Sporhase*."[69] The Court of Appeals for the Ninth Circuit affirmed this holding with little comment: "When Congress approved this compact, Congress was acting within its authority to immunize state law from some constitutional objections by converting it into federal law."[70]

Every case apportioning water among states does so in order to finally determine the quantity of water that can be maintained by each state for future use.[71] Every case interpreting interstate compacts has done so as to clarify the quantity of water apportioned to each compacting state and to determine whether another state has illegally attempted to take water apportioned to another state.[72] The Supreme Court has enforced compacts' water allocations to states' exclusive use and regulation to the point of ordering that money damages be paid to compensate a state for short deliveries.[73]

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68. *Id.* at 297.

69. *Id.* at 297; *see also id.* ("Thus, when it approves a[n interstate water] compact, Congress exercises the legislative power that the compact threatens to encroach upon, and declares that the compact is consistent with Congress's supreme power in that area.").

70. Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568, 570 (9th Cir. 1985); *cf.* Eder v. Cal. Dep't of Fish & Game, 87 Cal. Rptr. 3d 788, 795 (Cal. Ct. App. 2009) (finding that the enactment of federal legislation declaring that regulation of the taking of fish and wildlife within a state's boundaries should be left to the state "'moots' plaintiffs' dormant Commerce Clause claim").

71. *See e.g.*, Colorado v. New Mexico, 459 U.S. 176 (1982) (Vermejo River), *appeal after remand*, 467 U.S. 310 (1984); Nebraska v. Wyoming, 325 U.S. 589 (1945), *decree modified*, 345 U.S. 981 (1953), *settlement entered*, Nebraska v. Wyoming, 534 U.S. 40 (2001) (North Platte River); Wyoming v. Colorado, 259 U.S. 419 (1922), *decree modified*, 260 U.S. 1 (1922), *new decree entered*, 353 U.S. 953 (1957) (Laramie River); Kansas v. Colorado, 206 U.S. 46, 99-100 (1907) (Arkansas River).

72. *See, e.g.*, Montana v. Wyoming, 131 S. Ct. 1765 (2011) (Yellowstone River); Kansas v. Colorado, 514 U.S. 673 (1995) (Arkansas River); Oklahoma v. New Mexico, 501 U.S. 221 (1991) (Canadian River); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106 (1938).

73. *See, e.g.*, Kansas v. Colorado, 533 U.S. 1, 7 (2001) (Arkansas River Compact of 1949); Texas v. New Mexico, 482 U.S. 124, 128-33 (1987) (Pecos River Compact).

The literature discussing the importance of interstate compacts has concluded that the primary purpose—indeed the sole purpose—of an interstate water compact is to allow each state to know how much water of an interstate stream is allocated to it.[74] Professor Trelease's view is typical:

> Economic protection is the very purpose of the compact. The split of unappropriated water is intended to free the states from the need to race for the water under the usually applied (though recently questioned) rule of *Wyoming v. Colorado*: "priority is equity" between two states that apply the law of prior appropriation internally, and the same law will fix their shares in an equitable apportionment. A compact halts the race. Each state is given a fund of water free from the priorities of the other, each can develop at its own pace, and the slower state is protected from a complete takeover of the joint resource by the faster. To allow the faster state to overreach its allotment and eat into the other's in the name of interstate commerce would drain of all force the "legal expectation" given by the compact.[75]

But how can the equitable apportionment cases and the cases upholding economically protectionist compacts ratified by Congress be squared with the cases finding state economic protectionism over groundwater resources, as in *Sporhase*, to be essentially per se invalid?

VI. The Dormant Commerce Clause Cases Have No Application Once Congress Has Approved an Interstate Compact

Once Congress has determined, as a vital part of our federal/state partnership, that each state be apportioned some portion of the waters originating in it or passing through it to ensure its viability as a state, the dormant commerce clause is irrelevant. Even though state ownership of water may be a fiction in the absence of an interstate compact or an equitable apportionment decree, or a purchase or appropriation of water by a state, qua state, once the water is apportioned to a state by a compact or equitable apportionment decree, the state serves as the owner of the water

74. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 718 (1925); Julius M. Friedrich, *The Settlement of Disputes between States Concerning Rights to the Waters of Interstate Streams*, 32 IOWA L. REV. 244, 278 (1947); J. David Prince, *State Control of Great Lakes Water Diversion*, 16 WM. MITCHELL L. REV. 107, 158 (1990).

75. Frank J. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. REV. 347, 349 (1985).

in trust for the users within the boundaries. Making the state the owner of the resource in trust for its resident users is the only purpose of the equitable apportionment decree or interstate compact. Once enshrined by Congress into federal law, it is final.

Congress can preclude the application of the dormant commerce clause indirectly by authorizing the states to forge their own discriminatory regulation or it can do so directly by mandating that states take certain actions with respect to movement of goods in commerce. In the latter case, once Congress has acted, it is of no importance whether such state action might have been prohibited in absence of the congressional mandate. An example of the indirect approach is explored in *Prudential Insurance Co. v. Benjamin*.[76] The McCarran Act at issue in that case provided:

> The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.[77]

The best example of a direct congressionally-mandated approach is the congressionally-approved interstate compact. The Red River Compact, for example, expressly allocates water to Oklahoma that is not available in commerce to Texas and allocates water to Texas that is not available in commerce to Oklahoma.

Litigation arises when Congress has not legislated directly on the issue, and states attempt to argue solely by inference that Congress displaced the dormant commerce clause. *Sporhase v. Nebraska* ex rel. *Douglas*[78] and *South-Central Timber Development, Inc. v. Wunnicke*[79] both represent failed attempts by States to make such an inferential leap. In each case, Congress had not legislated on the specific subject at issue. Unlike *Prudential Ins. Co.*, there was no federal disclaimer of interest that purported to authorize the challenged state regulation of the relevant segment of commerce. There was no federal adoption of a compact allocating the resources at issue. In the absence of express legislation, the defenders of the discriminatory state laws were forced to *infer* that Congress *would have* authorized the challenged state regulation.

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76. 328 U.S. 408, 434 (1946).
77. *Id.* at 429 (quoting the McCarran Act, 15 U.S.C. § 1011 (1945)).
78. 458 U.S. 941 (1982).
79. 467 U.S. 82 (1984).

In *Wunnicke*, the party looked to federal regulations and policy governing timber resources on *federal* lands to support an inference of consent to Alaska's similar regulation of timber on *state* lands.[80] In *Sporhase*, the state looked to the Reclamation Act, the Desert Lands Act, and to interstate water compacts *in general* to support an inference that Congress would have deferred to state regulation of the groundwater at issue, which was not covered by a compact.[81] In both cases, the issue was what Congress would do if it chose to act in the future, not what Congress had done when it enacted specific legislation such as an interstate compact. Because there was no federal law directly addressing the matter subject to state discrimination, the Court required that the evidence be "expressly stated"[82] or "unmistakably clear"[83] before it would infer the intent of Congress from somewhat related laws. Neither *Sporhase* nor *Wunnicke* held or even suggested that a congressionally-approved interstate water compact itself, the essential provisions of which *apportion* water and affirm State regulation thereof, must meet a talismanic "unmistakably clear" requirement in order for the State regulation to escape invalidation. Rather, because Congress has acted, the test articulated in *McCulloch v. Maryland*,[84] which remains viable to this day, forms the basis for review. *Sporhase* and *Wunnicke* simply do not apply to this question, because neither interpreted an express mandate regulating interstate commerce.

A comparison of the circumstances of the groundwater prohibited from export in *Sporhase*[85] with an interstate stream apportioned by Congress provides the best example. In *Sporhase*, Congress had not acted to apportion the groundwater. Nebraska had not taken action to assert ownership of the groundwater for a state purpose. The express purpose of the statute was to isolate Nebraska's water from interstate commerce. In this circumstance, in the absence of an apportionment by Congress, Nebraska was obligated to demonstrate some rationale for the statute embargoing the water, which it could not do. The Court made the explicit point that interstate compacts and state boundaries are relevant and reflect a

80. *Id.* at 88-89.

81. *Sporhase*, 458 U.S. at 958-59.

82. *Id*. at 960.

83. *Wunnicke*, 467 U.S. at 82.

84. 17 U.S 316, 421 (1819) ("Let the end be legitimate . . . .").

85. *See Sporhase*, 458 U.S. at 956 (noting that the "legal expectation" that States may restrict water within their borders has been advanced "by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources").

different circumstance where different rules would apply. Finally, even though Nebraska was able to cite to some federal policies that would respect state regulation of groundwater, none explicitly authorized the embargo. The proposed place of use for the water was Colorado. Nebraska and Colorado had not negotiated a compact in good faith which had as its purpose allowing Nebraska to keep the groundwater that was sought to be exported. And, Congress had not expressly acted under the authority of the commerce clause to allow Nebraska to keep the groundwater. Thus, none of the policies urging states to negotiate their water differences and pressing for the finality of compacts existed, because there was no compact.

VII. The Policies Supporting a Free Interstate Market in Natural Resources Are Outweighed by the Policies Supporting the Finality of Interstate Compacts and the Need to Allow Each State to Plan for Its Water Future

While the dormant commerce clause policies continue to hold sway with the Court, as arbiter of the interstate marketplace, none of those policies apply—and indeed are specifically negated—when the states have been granted authority by Congress to enter into an interstate compact. The Compacts are presumed to apportion water among the states because this is their express purpose. There are substantial policy reasons for interpreting compacts as involving final apportionments. And, there is no inherently flawed anima for either state in seeking, in a sense as a market participant, to prefer its own citizens in using the very water that the state was able to negotiate for them in arriving at the compact.

It is of course inevitable that some states will be unsatisfied with the quantities they were able to obtain in negotiating under the compact. When this happens, hydrologic arguments over delivery amounts or interpretations over specific provisions inevitably break out, such as in *Texas v. New Mexico*.[86] However, it is rare that any state has the temerity to argue that the purpose of the compact was to do anything other than to apportion the water. In short, once Congress acted to apportion the water, the commerce clause is no longer dormant—its purpose has been made manifest and Congress concluded that it did not violate any principles of free interstate resource markets to apportion the waters in perpetuity among the states.

In a recent case, the Tarrant Regional Water District attempted to argue that the principles of *Sporhase* label as constitutionally suspect any state economic protectionist statute and, furthermore, should apply with equal

86. 482 U.S. 124 (1987).

force even in the face of federal legislation apportioning water by interstate compact.[87] Of course, the principal problem with this argument is that while states may be precluded by the dormant commerce clause from apportioning groundwater to themselves, Congress is not subject to such a constraint if it chooses to apportion water to a state or among states. The Court of Appeals for the Tenth Circuit so held in *Tarrant Regional Water Dist. v. Herrmann*, in an opinion issued on September 7, 2011.[88] The Court addressed the difference between the instant mater and the *Intake Water* case: "This case does not include a challenge to the [Red River] Compact, but the Compact is the focus of our analysis. We must examine the relationship between the Compact and the Oklahoma water statutes to decide whether Congress has displaced the restrictions of the dormant Commerce Clause."[89] At the same time, the Court distinguished *Sporhase*:

> *Sporhase* is distinguishable because in that case Nebraska was attempting to regulate the interstate transfer of groundwater that was not subject to an interstate compact. In this case, the water is subject to the Red River Compact, and the issue is whether the Compact insulates Oklahoma's statutes from dormant Commerce Clause challenge.[90]

After an exhaustive examination of the text of the Red River Compact, the Court concluded that it "gives Oklahoma wide berth to protect its compacted water against out-of-state transfer and use."[91]

Congress has apportioned water in the Boulder Canyon Project for the lower Colorado and has ratified innumerable interstate compacts achieving the same result. Indeed, conferring the power to regulate commerce was the very function anticipated in adoption of the Commerce Clause. While those who attempt to use *Sporhase* as a sword to invalidate congressional apportionment may themselves believe that state control over a fixed amount of water is so inherently evil that the Court should sift and weigh the relative monopolistic pressures exerted by states, and invalidate apportionments under interstate compacts, this is not the view of the

87. Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222 (10th Cir. 2011).

88. *Id.* at 1251. At around the same time, the Tenth Circuit determined that the Cities of Hugo, Oklahoma and Irving, Texas lacked standing to challenge the Oklahoma statutes under the political subdivision standing doctrine. City of Hugo v. Nichols, 656 F.3d 1251, 1257-58, 1264-65 (10th Cir. 2011).

89. *Tarrant Reg'l Water Dist.*, 656 F.3d at 1236.

90. *Id.* at 1237 (citation omitted).

91. *Id.* at 1239.

Supreme Court. *Commonwealth Edison* made this point clear. To the contrary, the Court has expressly left this function to Congress, recognizing it contains neither the will nor the judicial authority to make such judgments.

Conclusion

The Supreme Court is correct in urging Congress to ratify apportionments of water to states. Water serves vital and multiple purposes directly tied to state sovereignty. Its momentum value generates much-needed hydropower; its buoyancy value floats barges; it is a universal solvent essential to all forms of manufacturing including computer chips; and it is essential for agriculture and for domestic consumption of cities. The Supreme Court has determined that each state has a right to some share of this resource and the best method for determining that share is the interstate compact. The interstate compact gives meaning to the boundaries of each sharing the water resource. It permits each state to define the supply based on its own projected rate of growth. It allows the states to take actions against those who might waste the resource, and it provides accountability for state officials who dispose of it in a way inconsistent with the will of the people within the state boundaries. Whether the per se rule of the invalidity of state attempts to capture some quantity of water for their exclusive use in the absence of congressional action is a good one, this Supreme Court imposed presumption should never be used to invalidate interstate compacts and preclude water planning by states based upon the amount of water apportioned to them by Congress.